United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1218

74-1218, 74-1265, 74-1266, 74-1354 and 74-1438

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Docket Nos. 74-1218, 74-1265, 74-1266, 74-1354 and 74-1438

In the Matter of the Complaint
of
COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

BINGHAM & COMPANY, *et al.*,
Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD.,
Defendant-Appellee.

KELLER INDUSTRIES, INC.,
Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK LTD., CUNARD-BROCKLEBANK LTD., COMPANIA NAVIERA EPSILON, S.A., S.G. EMBIRICOS LTD. and the S.S. NICOLAOS S. EMBIRICOS,
Defendants-Appellees.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT, COMPANIA NAVIERA EPSILON, S.A., AS OWNER OF THE M.S. NICOLAOS S. EMBIRICOS, ON APPEAL FROM THE DECISION AWARDING CHARTERER ITS LEGAL EXPENSES

HEALY & BAILLIE
Attorneys for Compania Naviera Epsilon, S.A.

ALLAN A. BAILLIE
JOHN C. KOSTER
NICHOLAS J. HEALY
of Counsel

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Statement of the Issues Presented for Review

The issue presented for review on the appeal of Compania Naviera Epsilon, S.A. (hereinafter "Owner") is whether the owner of a vessel, fully exonerated under

Section 4(2)(a) of the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1304(2)(a), for loss of and damage to cargo owned by third parties and carried on the vessel under bills of lading issued by a time charterer, must nevertheless reimburse the charterer, similarly exonerated from liability to cargo, for legal fees and disbursements incurred by the charterer in defending the claim brought by the Cargo Interests against the charterer as a carrier, in prosecuting the charterer's own claims against cargo for collect freight, and in prosecuting the charterer's indemnity claim against the owner.

Owner's Statement of the Issues Presented for Review on the appeal of the Cargo Interests from the decision below denying them a recovery will be included in Owner's Brief in reply to the Cargo Interests' Brief.

Statement of the Case and Facts

Bingham & Company, *et al.*, owners of cargo carried on the M.S. NICOLAOS S. EMBIRICOS (hereinafter referred to collectively as "Cargo"*), sued the vessel's Owner and Thos. & Jno. Brocklebank, Ltd., Charterer of the M.S. NICOLAOS S. EMBIRICOS (hereinafter "Charterer"), for loss of and damage to cargo which occurred when the vessel stranded on a reef off Suvadiva Atoll of the Maldive Islands in the Indian Ocean. Cargo had been loaded at Pakistani, Indian and Ceylonese ports for carriage to ports on the East and Gulf Coasts of the United States. The vessel was then operating under a New York Produce Exchange form of Time Charter between Owner and Charterer, and the cargo was being carried under bills of lading signed by Charterer's agents "for the Master".

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* Keller Industries, Inc., owners of a relatively small portion of the cargo, filed an action under Docket No. 69 Civ. 4644. Keller did not actively participate in the trial, but agreed to be bound by the results (T.M. p. 3).

Owner filed a complaint for exoneration from or limitation of liability and the action theretofore brought by Cargo against Owner was stayed by the injunction entered in the limitation proceeding. Cargo filed claims for cargo loss and damage in that proceeding and Charterer filed a contingent claim, seeking indemnity in the event it should be held liable to Cargo. Charterer also filed a claim against Cargo for collect freight, and a contingent claim against Owner for the amount of the freight, in case it should be held that it was not entitled to recover it from Cargo.*

Cargo's actions against Charterer were consolidated with the limitation proceeding. A trial was thereafter held before the Honorable Marvin E. Frankel, U.S.D.J., who rendered a decision finding as fact that the stranding was caused by errors of navigation, and that no unseaworthiness contributed to it. Judgment was thereafter entered exonerating both Owner and Charterer from liability to Cargo, awarding Charterer collect freight from Cargo, and further awarding Charterer legal fees and disbursements in the total amount of $136,374.74 against Owner. Cargo appealed from the decision denying it a recovery for the cargo loss and damage and Owner appealed from so much of the decision as awarded Charterer its expenses.

Summary of Argument

I. The decision of the District Court allowing Charterer to recover legal fees and disbursements from Owner completely ignores the "errors of navigation" exception of the "mutual exceptions" clause of the governing Time Charter, which in plain language "means that neither

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* It should be noted that Charterer did not even claim to be entitled to attorneys' fees *in the event the Cargo claims were defeated* in either the Answer and Claim filed in the Limitation proceeding or in the Pre-Trial Order. The contention did not appear until proposed findings of fact and conclusions of law were exchanged shortly before trial.

party shall be liable to the other for the consequences of any of the enumerated causes". Gilmore & Black, *The Law of Admiralty,* Section 4-18, Page 209.

II. Section 4(2)(a) of COGSA, 46 U.S.C. § 1304(2)(a), exonerates a "carrier" from liability for cargo loss and damage caused by errors in navigation. Cargo, therefore, has no possible basis for recovery if the loss and damage has been caused solely by navigational errors. The Record and Briefs make it clear that Cargo, fully aware of the law, sought to prove that unseaworthiness was a contributing cause, and it was against this effort that both Owner and Charterer were required to defend. The defense was completely successful, and Charterer therefore has no more right to require Owner to pay its legal expenses in defending than Owner has to require Charterer to pay Owner's expenses. It follows that even if the Charter had contained no "errors of navigation" exception, Charterer would not be entitled to recover its legal expenses, as these were incurred, not in defending cargo claims based on errors in navigation, but rather, (1) in successfully defending cargo claims based on alleged unseaworthiness; (2) in successfully prosecuting a claim against Cargo for freight monies, and (3) in prosecuting an unfounded claim against Owner for indemnity.

ARGUMENT

I.

The "errors of navigation" exception of the time charter shields owner from any possible liability to charterer for any part of its legal expenses.

The Time Charter between Owner and Charterer contained the following provisions:

> "16. That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to

the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and *errors of Navigation throughout this Charter Party, always mutually excepted.**

"The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property."

* * *

"26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, acts of Pilots and Tugs, insurance, crew, and all other matters, same as when trading for their own account."

In its opinion the District Court refers only to Clause 26, from which it infers an absolute undertaking on Owner's part that the navigation of the vessel will be conducted without the intervention of any possible human error. In doing so, it ignores Clause 16 completely.

In *Crossman* v. *Burrill*, 179 U.S. 100, 106-7 (1900), the Supreme Court had before it the problem of reconciling the "cesser clause" of a voyage charter, providing for the cessation of a charterer's further liability once a vessel had been loaded and bills of lading issued, with charter provisions for the payment of freight by the charterer on delivery, and for demurrage for delay in delivery. The Court said:

"The charter-party, like many mercantile instruments in common use, is drawn up in brief and disjointed sentences; and must be construed according

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* Emphasis throughout has been supplied, unless otherwise indicated.

> to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself."

The Supreme Court quoted with approval the remarks of Lord Esher in *Clink* v. *Radford,* [1891] 1 Q.B. 625, that "it cannot be assumed that the shipowner, without any mercantile reason, would give up by the cesser clause rights which he had stipulated for in another part of the contract." 179 U.S. 100, at 107.

So in this case, Owner cannot by its undertaking, in Clause 26, to be responsible for navigation, be assumed to have given up the protection, vis-a-vis Charterer, of the mutual exception of navigational errors afforded to it by the plain language of Clause 16, the "general exceptions" clause. Actually, Clause 26 does not deal at all with liabilities of Owner/Charterer, one to the other, but with the division of duties under the Charter. Since the Charter is expressly stated not to be a demise, Owner is to remain responsible for all matters for which it would be responsible if the vessel were trading for Owner's own account. Thus, if the vessel were in collision as the result of an error on the part of her navigator, Owner, and not Charterer, would be responsible to the owners of the other ship. If Charterer were sued by the owners of the other ship—on what grounds cannot be imagined—Owner would have no obligation to pay Charterer's legal fees and disbursements in defending the action.

There is no question but that many maritime contracts such as charter parties, usually standard forms which are altered, by interlineations and added to by typed addenda, are not precision documents. The standard forms themselves have grown by accretion over the years. Better draftsmanship would take the exceptions clause out of Clause 16 of the New York Produce Exchange form and make it a separate clause. Apparently the exceptions

clause was a separate clause at one time in this form of charter. See *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 276 (2d Cir. 1909), cert. denied 214 U.S. 523. It was probably combined with the provision for refund of hire in 1913 when the New York Produce Exchange first revised the "Government Form" of time charter and made it its own. See *Gans S.S. Line* v. *Wilhelmsen*, 275 Fed. 254, 257 (2d Cir. 1921), cert. denied 257 U.S. 655. But to treat the exceptions provision as a nullity because it is included in a clause with other provisions is to offend elementary principles of contract construction. It is basic that all provisions of a contract must be given effect if possible.

II.

Even if the "errors of navigation" exception of the charter had not shielded owner against any possible liability for charterer's legal expenses, charterer would not have been entitled to recover them, as they were not incurred in defending cargo claims based upon any actionable fault of owner or its employees.

It is apparent that Charterer's Attorneys performed legal services and incurred disbursements falling into three distinct categories:

a. The prosecution of Charterer's claim against Owner for indemnity in respect of the expense of defending Cargo's claims;

b. The successful prosecution of Charterer's claim against Cargo for freight monies, and the prosecution of Charterer's contingent claim against Owner in case Charterer failed to recover them from cargo;

c. The successful defense of Cargo's claims against Charterer, as a "carrier", for the cargo loss and damage.

None of the expense so incurred was properly chargeable to Owner.

a. and b. The Cost of Prosecuting Charterer's Claims against Owner for Indemnity and against Cargo for Freight Monies.

The District Court recognized the fact that Charterer's Attorneys' account included services rendered and disbursements incurred other than in defense of Cargo's claims against Charterer. (See footnote on page 29 of the opinion below, App. p. 110a.) Nevertheless, the Court declined to direct a separation of the expenses of prosecuting Charterer's claims from the expenses of defending Cargo's claims against Charterer. The law seems quite clear that despite practical difficulties such a separation is required. *Paliaga* v. *Luckenbach Steamship Company*, 301 F.2d 403, 409 n.1 (2d Cir. 1962); *Calderone* v. *Naviera Vacuba S/A*, 328 F.2d 578 (2d Cir. 1964), *modifying* 325 F.2d 76 (1963).

c. The Cost of Defending the Cargo Claims.

In holding Owner responsible for Charterer's expenses in defending the cargo claims, the District Court made the fundamental error of attributing the claims to fault on the part of Owner's employees, *i.e.*, errors of navigation. In fact, the cargo claims were *not* based upon any error of navigation; Cargo was fully aware that under COGSA it could not possibly recover against either Owner or Charterer by proving that the cause of the stranding and the consequent cargo loss and damage was a navigational error. The Record and Briefs make it crystal clear that Cargo's efforts were directed to an attempt to prove that the damage was caused by unseaworthiness. The attempt failed completely; the District Court found that there was no unseaworthiness, and therefore properly denied Cargo a recovery.

The present case is quite different from *Nichimen Company* v. *M.V. Farland*, 462 F.2d 319 (2d Cir. 1972), cited by the District Court as authority for its award of legal fees and disbursements. *Nichimen* did *not* involve loss of or damage to cargo resulting from an error of navigation, or from any other cause excepted under COGSA or the time charter whereunder the vessel was operating. On the contrary, in *Nichimen* the cargo damage was caused by the charterer's negligence in performing its express time charter undertaking to load and stow the cargo. Since negligent stowage is *not* a cause excepted under COGSA, the cargo interests were entitled to recover from the shipowner as a carrier, and since under the time charter the responsibility for proper stowage rested upon the charterer, the latter was very properly required to indemnify the shipowner, not only in respect of the cargo claims, but also the expenses to which the shipowner was put in defending them.

If "errors of navigation" were not a cause of cargo loss and damage excepted under COGSA, and if the Time Charter in the present case did not except "errors of navigation", Owner, who, under Clause 26 had the responsibility for the navigation of the vessel, would have been in a position corresponding to that of the charterer in *Nichimen*, wherein this Court said, in affirming the District Court's award of legal expenses to the owner (462 F.2d 319, at 333):

> "If Seaboard [the time charterer] breached its duty to Vigra [the shipowner] under clause 8 of the charter [to load and stow the cargo] it is bound to make good the expectable consequences of its breach, of which the incurring of attorneys' fees in defending against a claim by Nichimen was surely one."

That a cargo owner would prosecute a claim against a shipowner, as a carrier, for damage to cargo caused by the time charterer's negligence in stowage is certainly an expectable consequence of a charterer's breach of its undertaking to stow the chartered vessel, just as the prosecution of a claim against the charterer, as a carrier, would be an expectable consequence of a shipowner's breach of its undertaking to care for the cargo properly during the voyage. In either case, therefore, the incurring of legal expenses in defending the cargo claim would likewise be an expectable consequence of the breach.

Here, however, COGSA completely exonerates a carrier from any liability for cargo loss and damage resulting from errors of navigation (46 U.S.C. § 1304(2)(a). It is therefore *not* an "expectable consequence" of "errors of navigation" that cargo owners will prosecute claims against a time charterer, as a carrier, for cargo damage resulting from such errors. No such claim was in fact prosecuted; on the contrary, Cargo sought to prove, unsuccessfully, that the loss and damage were caused by unseaworthiness.

The element of liability, or at the very least probable liability, to another party in the first instance is essential to a right of indemnity. Thus, in *David Crystal, Inc.* v. *Cunard Steam-Ship Co.*, 339 F.2d 295, 300 (2d Cir. 1964) *cert. denied* 380 U.S. 976 (1965), the vessel owner was held liable to the cargo interests for a misdelivery of cargo, but was awarded indemnity, including legal expenses, from the stevedores who had undertaken to be responsible for the safekeeping of the cargo following its discharge from the vessel, and for its proper delivery. The vessel owner was clearly entitled to recover its legal expenses from the stevedores because it was the latters' negligence that had caused the shipowner to be held liable to the cargo interests.

In *The Toledo*, 122 F.2d 255, 257 (2d Cir. 1941), *cert. denied* 314 U.S. 689 (1941), the Court stated:

> "**** A claim for indemnity, however, requires that an actual liability be sustained by the indemnitee, and if he settles a claim without a determination

> of the rights in question, he bears the risk of proving an actual liability in the action over for indemnity. ***''

See also *Tankrederiet Gefion A/S* v. *Hyman-Michaels Company*, 406 F.2d 1039 (6th Cir. 1969). In the present case no actionable fault on Owner's part caused Charterer to be held liable, or even to the exposed to possible liability, to Cargo.

See also *A/S Brovanor* v. *Central Gulf Steamship Corp.*, 323 F.Supp. 1029, 1033 (S.D.N.Y. 1970), where the court allowed a recovery of attorneys' fees by a vessel owner from a charterer because the owner had been "cast in liability" by the charterer's negligence.

Charterer here was *not* "cast in liability" by the errors of navigation of the Master of the NICOLAOS S. EMBIRICOS. While Charterer was sued, the basis of the action was not those navigational errors, for which Charterer could never be liable, but alleged unseaworthiness, which the Court found never existed. The effect of the District Court's allowance of legal fees and distbursements was to make Owner an insurer against Charterer being sued, however groundless the action.

CONCLUSION

The judgment of the District Court should be modified by elimintating therefrom the provision for a recovery by charterer from owner of charterers' legal fees and disbursements, and in all other respects it should be affirmed; owner should be awarded costs against charterer, as well as against the cargo interests.

Respectfully submitted,

HEALY & BAILLIE
Attorneys for Compania Naviera Epsilon, S.A.

ALLAN A. BAILLIE
JOHN C. KOSTER
NICHOLAS J. HEALY
Of Counsel

RECEIPT OF TWO COPIES OF THE WITHIN BRIEF IS HEREBY ACKNOWLEDGED

6/17/74

Lord, Day & Lord

ATTORNEYS FOR THOS. & JNO. BROCKLE BANK, LTD., APPELLEE

Bigham England Jones & Houston

ATTORNEYS FOR BIGHAM & COMPANY ET AL, PLAINTIFFS-APPELLANTS 6/17/74

David P. Jones 6/17/74

ATTORNEYS FOR KELLER INDUSTRIES INC., PLAINTIFF-APPELLANT